

Memorandum 2010-19

Trial Court Restructuring: Rights and Responsibilities of the County as Compared to the Superior Court (Discussion of Issues)

This memorandum continues the Commission's trial court restructuring work on rights and responsibilities of the county as compared to the superior court.

The staff is systematically searching the codes for provisions that need revision to reflect the shift from county to state funding of trial court operations. The staff is searching the codes alphabetically for key terms, including "county," and "board of supervisors," to find provisions needing revision that we have not already identified.

This memorandum discusses some of the provisions that need revision in the Evidence Code and the Family Code. We identified one Evidence Code provision and about twenty Family Code provisions. The Evidence Code provision — Section 754 — and twelve Family Code provisions — Sections 1814, 1820, 1834, 1838, 1850, 3025.5, 3153, 3170, 3173, 3181, 3188, and 6303 — are discussed below. The discussion of the Family Code provisions is generally organized by subject matter and division in which they are located (Division 5, relating to conciliation proceedings, and Division 8, relating to the custody of children). The remainder of the Family Code provisions will be discussed in a future memorandum.

In the discussion below, the staff proposes several revisions based on its analysis of statutes that shift responsibility for trial court operations and court employees (i.e., the Lockyer-Isenberg Trial Court Funding Act, and the Trial Court Employment Protection and Governance Act). However, in some instances, the staff is unsure whether the suggested revisions reflect actual practice. **Accordingly, the staff specially seeks input on that issue.**

The Commission should consider the revisions below, with or without change, for purposes of preparing a tentative recommendation.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

EVID. CODE § 754. INTERPRETER FOR AN INDIVIDUAL
WHO IS DEAF OR HEARING IMPAIRED

Evidence Code Section 754 is a lengthy section governing appointment of an interpreter for a person who is deaf or hearing impaired. The section requires appointment of an interpreter for such a person in any civil or criminal action, court-ordered or court-provided alternative dispute resolution, or administrative hearing, as specified in subdivision (b). The section also governs appointment of an interpreter for such a person during an interview by someone with a law enforcement or prosecutorial function, as specified in subdivisions (j)-(l).

The full text of Section 754 is reproduced at Exhibit pages 1-3. For present purposes, the key provisions are:

754. (a) As used in this section, “individual who is deaf or hearing impaired” means an individual with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone, but does not include an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment provided pursuant to Section 54.8 of the Civil Code.

(b) In any civil or criminal action, including, but not limited to, any action involving a traffic or other infraction, any small claims court proceeding, any juvenile court proceeding, any family court proceeding or service, or any proceeding to determine the mental competency of a person, in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or any administrative hearing, where a party or witness is an individual who is deaf or hearing impaired and the individual who is deaf or hearing impaired is present and participating, the proceedings shall be interpreted in a language that the individual who is deaf or hearing impaired understands by a qualified interpreter appointed by the court or other appointing authority, or as agreed upon.

....

(i) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person’s regular duties as an employee of the state, county, or other political subdivision of the state. Payment of the interpreter’s fee shall be a charge against the county, or other political subdivision of the state, in which that action is pending. Payment of the interpreter’s fee in administrative proceedings shall be a charge against the appointing board or authority.

(j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an interpreter shall be made, without any unnecessary delay unless either the individual who is deaf or hearing impaired affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder.

(k) No statement, written or oral, made by an individual who the court finds is deaf or hearing impaired in reply to a question of a peace officer, or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding, may be used against that individual who is deaf or hearing impaired unless the question was accurately interpreted and the statement was made knowingly, voluntarily, and intelligently and was accurately interpreted, or the court makes special findings that either the individual could not have used an interpreter or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder and that the statement was made knowingly, voluntarily, and intelligently.

(l) In obtaining services of an interpreter for purposes of subdivision (j) or (k), priority shall be given to first obtaining a qualified interpreter.

(m) Nothing in subdivision (j) or (k) shall be deemed to supersede the requirement of subdivision (b) for use of a qualified interpreter for individuals who are deaf or hearing impaired participating as parties or witnesses in a trial or hearing.

....

The section was enacted in 1967, as part of the Evidence Code recommended by the Commission. See 1965 Cal. Stat. ch. 299, § 2. It has been amended several times without Commission involvement. See 1995 Cal Stat. ch. 143, § 1, 1992 Cal Stat. ch. 913, § 14, 1992 Cal. Stat. ch. 118, § 1, 1991 Cal. Stat. ch. 883, § 1, 1990 Cal. Stat. ch. 1450, § 2, 1989 Cal. Stat. ch. 1002, § 2, 1984 Cal. Stat. ch. 768, § 2, 1977 Cal. Stat. ch. 1182, p. 3873, § 1.

Subdivision (i) governs payment of the interpreter. It provides generally that the interpreter's fee is paid by the county, or other political subdivision of the state. The exception is administrative proceedings, in which the interpreter's fee is paid by the entity conducting the proceedings.

The provision needs revision to reflect the Lockyer-Isenberg Trial Court Funding Act (hereafter, "Trial Court Funding Act," or "Act"). That Act shifted

funding of “court operations” from the county to the state. See Gov’t Code §§ 77000-77655. Provisions setting forth “court operations” specify that court interpretation is a court operation, funded by the state. See Gov’t Code § 77003; Cal. R. Ct. 10.810(d), Function 4.

Therefore, an interpreter appointed pursuant to Section 754 in any civil or criminal proceeding should be paid by the court. It also seems that an interpreter appointed pursuant to Section 754 in any court-ordered or court-connected alternative dispute resolution program should be paid by the court. **Accordingly, the staff recommends revising Section 754 to provide that the court, not the county, pays the interpreter in a court proceeding.** The county would remain responsible for payment of an interpreter for a hearing-impaired witness who is interviewed by law enforcement. The rule regarding payment of such an interpreter in an administrative proceeding would also remain unchanged. Interpretation in those contexts are not “court operations.”

For purposes of preparing a tentative recommendation, **those principles could be implemented by revising Section 754 along the following lines:**

754. ...

(i) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person’s regular duties as an employee of the state, county, or other political subdivision of the state. Payment Except as provided in subdivision (j), payment of the interpreter’s fee shall be a charge against the county, or other political subdivision of the state, in which that action is pending court. Payment of the interpreter’s fee in administrative proceedings shall be a charge against the appointing board or authority.

(j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an interpreter shall be made, without any unnecessary delay unless either the individual who is deaf or hearing impaired affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder. Payment of the interpreter’s fee shall be a charge against the county, or other political subdivision of the state, in which the action is pending.

....

Comment. Subdivisions (i) and (j) of Section 754 are revised to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Government Code Sections 77000-77655). See, e.g., Gov't Code §§ 77003 ("court operations" defined), 77200 (state funding of "court operations"); see also Cal. R. Ct. 10.810(d), Function 4 (court interpreters).

(Note: The Commission recently studied other provisions governing interpretation in court proceedings, such as Evidence Code Section 752 (interpreter for witness), and Government Code Sections 26806 (foreign language interpreters in county of 900,000 or more persons), 68092 (compensation of interpreter), and 69894.5 (employment and assignment of interpreter). The Commission recently recommended amending those provisions to reflect trial court restructuring reforms, including the Trial Court Interpreter Employment and Labor Relations Act (Gov't Code §§ 71800-71829) (hereafter, "the Interpreter Act"). See Pre-Print Recommendation on *Statutes Made Obsolete by Trial Court Restructuring: Part 5*, pp. 5-12, 19-23 (2009). Unlike the provisions in the Commission's recommendation, Evidence Code Section 754 does not need revision to reflect the Interpreter Act. That is because the Interpreter Act governs *spoken language* interpretation. See Gov't Code § 71802. It does not govern interpretation provided pursuant to Section 754 — *sign language* interpretation, *oral* interpretation (silent mouth movement to make spoken language understood by person who lip-reads), and *deaf-blind* interpretation. See Evid. Code § 754(d); Gov't Code § 71802.)

DIVISION 5 OF THE FAMILY CODE. CONCILIATION PROCEEDINGS

Background

Five Family Code provisions — Sections 1814, 1820, 1834, 1838, and 1850 — in Division 5, relating to conciliation proceedings, appear to need revision to reflect trial court restructuring.

The first four provisions are located in the same part, which sets forth the Family Conciliation Court Law. See Fam. Code § 1800 (providing that Sections 1800-1842 comprise Family Conciliation Court Law). Each superior court determines annually whether the Family Conciliation Court Law applies, based on social conditions and domestic relations cases in the county. See Fam. Code § 1802. When it applies, a petition may be filed in the family conciliation court to

(1) preserve a marriage by effecting reconciliation, or (2) reach an amicable settlement of a dispute between spouses or parents, so as to avoid further litigation of the issue. Fam. Code § 1831.

The remaining provision — Section 1850 — is in the part immediately following the Family Conciliation Court Law. The part relates to statewide coordination of family mediation and conciliation services.

All five of the provisions were part of the Family Code enacted upon Commission recommendation. See 1992 Cal. Stat. ch. 162, § 10 (operative Jan. 1, 1994); Fam. Code §§ 1814, 1820, 1834, 1838, 1850 & Comments. None have been revised since they went into effect in 1994.

For ease of discussion, Sections 1820 and 1814 are considered below in that order, followed by Sections 1834, 1838, and 1850.

Fam. Code § 1820. Joint Family Conciliation Court Services

Section 1820 authorizes a county to contract with another county to provide “joint family conciliation court services.” The section sets forth items that the contract may include.

The section provides:

1820. (a) A county may contract with any other county or counties to provide joint family conciliation court services.

(b) An agreement between two or more counties for the operation of a joint family conciliation court service may provide that the treasurer of one participating county shall be the custodian of moneys made available for the purposes of the joint services, and that the treasurer may make payments from the moneys upon audit of the appropriate auditing officer or body of the county of that treasurer.

(c) An agreement between two or more counties for the operation of a joint family conciliation court service may also provide:

(1) For the joint provision or operation of services and facilities or for the provision or operation of services and facilities by one participating county under contract for the other participating counties.

(2) For appointments of members of the staff of the family conciliation court including the supervising counselor.

(3) That, for specified purposes, the members of the staff of the family conciliation court including the supervising counselor, but excluding the judges of the family conciliation court and other court personnel, shall be considered to be employees of one participating county.

(4) For other matters that are necessary or proper to effectuate the purposes of the Family Conciliation Court Law.

(d) The provisions of this part relating to family conciliation court services provided by a single county shall be equally applicable to counties which contract, pursuant to this section, to provide joint family conciliation court services.

The section needs to be revised to reflect the Trial Court Funding Act.

The section should also be revised to reflect the Trial Court Employment and Protection Governance Act (the "TCEPGA"), which transferred control of trial court employment to the courts. See Gov't Code §§ 77000-77655.

Revisions to reflect the Trial Court Funding Act are discussed first, followed by revisions to reflect the TCEPGA. Section 1820 is then set forth again, but with revisions to incorporate each recommendation below.

Revisions To Reflect the Trial Court Funding Act

Section 1820 authorizes a county to contract for joint family conciliation court services with another county. Now that the county no longer funds or manages the courts, however, the courts themselves should be authorized to contract with each other for such services. **The staff therefore recommends revising Section 1820 to authorize the court, rather than the county, to contract for joint family conciliation court services.**

Further revisions to the section should be made to reflect that the court, not the county, would control the funds for such services. Subdivision (b) provides that the contract may provide for one county's treasurer to be the custodian over money made available for the services, and authorizes payment from that money upon audit by the appropriate officer of the county.

With the courts, not the counties, authorized to contract with each other for the services, money for the services would come from courts' budgets. Accordingly, the county's treasurer and auditing officer would no longer exercise control over the money. **The staff therefore recommends revising Section 1820(b) to (1) refer to the court as custodian of the money, and (2) refer to an auditing officer of the court, rather than the county.**

Revisions To Reflect the TCEPGA

One of the items that a contract for joint family conciliation court services may include relates to the court's staff. Specifically, Section 1820(c)(3) provides that family conciliation court staff, excluding judges and "other court personnel,"

may be considered employees of “one participating county,” for specified purposes.

Under the TCEPGA, court staff are no longer employed by the county, but are employed directly by the court. **The reference to employees of “one participating county” should therefore be replaced with a reference to “one participating court.”** That revision would render nonsensical the exclusion of “other court personnel.” **Accordingly, the reference to “other court personnel” should be deleted.**

Recommendation

Taking together the above, for purposes of preparing a tentative recommendation, **the staff recommends revising Section 1820 along the following lines:**

1820. (a) A ~~county court~~ county court may contract with any other ~~county court or counties courts~~ county court to provide joint family conciliation court services.

(b) An agreement between two or more ~~counties courts~~ county courts for the operation of a joint family conciliation court service may provide that ~~the treasurer of one participating county court~~ shall be the custodian of moneys made available for the purposes of the joint services, and that the ~~treasurer~~ custodian court may make payments from the moneys upon audit of the appropriate auditing officer or body of the ~~county of that treasurer court~~.

(c) An agreement between two or more ~~counties courts~~ county courts for the operation of a joint family conciliation court service may also provide:

(1) For the joint provision or operation of services and facilities or for the provision or operation of services and facilities by one participating ~~county court~~ county court under contract for the other participating ~~counties courts~~.

(2) For appointments of members of the staff of the family conciliation court including the supervising counselor.

(3) That, for specified purposes, the members of the staff of the family conciliation court including the supervising counselor, but excluding the judges of the family conciliation court ~~and other court personnel~~, shall be considered to be employees of one participating ~~county court~~ county court.

(4) For other matters that are necessary or proper to effectuate the purposes of the Family Conciliation Court Law.

(d) The provisions of this part relating to family conciliation court services provided by a single ~~county court~~ county court shall be equally applicable to ~~counties courts~~ county courts which contract, pursuant to this section, to provide joint family conciliation court services.

Comment. Section 1820 is amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code §§ 77001 (local trial court management), 77003 ("court operations" defined), 77200 (state funding of "court operations"); see also Cal. R. Ct. 10.810.

The section is also amended to reflect the enactment of the Trial Court Employment Protection and Governance Act, 2000 Cal. Stat. ch. 1010 (codified as Gov't Code §§ 71600-71675). See, e.g., Gov't Code § 71620(a) (job classifications and appointments).

Fam. Code § 1814. Family Conciliation Court Personnel

Section 1814 concerns the appointment and duties of persons who serve the family conciliation court. The section provides:

1814. (a) In each county in which a family conciliation court is established, the superior court may appoint one supervising counselor of conciliation and one secretary to assist the family conciliation court in disposing of its business and carrying out its functions. In counties which have by contract established joint family conciliation court services, the superior courts in contracting counties jointly may make the appointments under this subdivision.

(b) The supervising counselor of conciliation has the power to do all of the following:

(1) Hold conciliation conferences with parties to, and hearings in, proceedings under this part, and make recommendations concerning the proceedings to the judge of the family conciliation court.

(2) Provide supervision in connection with the exercise of the counselor's jurisdiction as the judge of the family conciliation court may direct.

(3) Cause reports to be made, statistics to be compiled, and records to be kept as the judge of the family conciliation court may direct.

(4) Hold hearings in all family conciliation court cases as may be required by the judge of the family conciliation court, and make investigations as may be required by the court to carry out the intent of this part.

(5) Make recommendations relating to marriages where one or both parties are underage.

(6) Make investigations, reports, and recommendations as provided in Section 281 of the Welfare and Institutions Code under the authority provided the probation officer in that code.

(7) Act as domestic relations cases investigator.

(8) Conduct mediation of child custody and visitation disputes.

(c) The superior court, or contracting superior courts, may also appoint, with the consent of the board of supervisors, associate

counselors of conciliation and other office assistants as may be necessary to assist the family conciliation court in disposing of its business. The associate counselors shall carry out their duties under the supervision of the supervising counselor of conciliation and have the powers of the supervising counselor of conciliation. Office assistants shall work under the supervision and direction of the supervising counselor of conciliation.

(d) The classification and salaries of persons appointed under this section shall be determined by:

(1) The board of supervisors of the county in which a noncontracting family conciliation court operates.

(2) The board of supervisors of the county which by contract has the responsibility to administer funds of the joint family conciliation court service.

Section 1814 needs to be revised to reflect the Trial Court Funding Act and the TCEPGA. Revisions to reflect the Trial Court Funding Act are discussed first, followed by revisions to reflect the TCEPGA. Section 1814 is then set forth again, but with revisions to incorporate the recommendations below.

Revisions To Reflect the Trial Court Funding Act

Section 1814 refers to a contract by a county to provide joint family conciliation court services. See Section 1814(a) & (d)(2). As discussed above, Section 1820 currently provides that the county may contract for those services. Because counties no longer fund or manage the courts, we have recommended revising Section 1820 to authorize courts, rather than counties, to contract for those services. **Section 1814 should in turn be revised to reflect those revisions of Section 1820.** Specifically, instead of referring to a contract by a county to provide joint family conciliation court services, the section should refer to a contract by a court to provide those services.

Revisions To Reflect the TCEPGA

It appears that two provisions of Section 1814 need revision to reflect the enactment of the TCEPGA.

First, subdivision (c) provides that a court may appoint associate counselors and other office assistants of the family conciliation court, but only with the approval of the board of supervisors. Under the TCEPGA, however, courts themselves control the hiring of court employees. See Gov't Code § 71620(a). **Accordingly, subdivision (c) should be revised to delete the requirement for approval by the board of supervisors.**

Second, subdivision (d) provides that the board of supervisors determines the appointees' classification and salaries. Under the TCEPGA, however, the courts create job classifications for court employees and determine their salaries. See Gov't Code §§ 71620(a), 71623(a). **Accordingly, Section 1814(d) should be revised to state that the court, instead of the board of supervisors, determines appointees' classification and salaries.**

Recommendation

For purposes of preparing a tentative recommendation, **the staff recommends revising Section 1814 as follows:**

1814. (a) In each county in which a family conciliation court is established, the superior court may appoint one supervising counselor of conciliation and one secretary to assist the family conciliation court in disposing of its business and carrying out its functions. ~~In counties which have~~ When superior courts by contract have established joint family conciliation court services, the ~~superior contracting courts in contracting counties~~ jointly may make the appointments under this subdivision.

(b) The supervising counselor of conciliation has the power to do all of the following:

(1) Hold conciliation conferences with parties to, and hearings in, proceedings under this part, and make recommendations concerning the proceedings to the judge of the family conciliation court.

(2) Provide supervision in connection with the exercise of the counselor's jurisdiction as the judge of the family conciliation court may direct.

(3) Cause reports to be made, statistics to be compiled, and records to be kept as the judge of the family conciliation court may direct.

(4) Hold hearings in all family conciliation court cases as may be required by the judge of the family conciliation court, and make investigations as may be required by the court to carry out the intent of this part.

(5) Make recommendations relating to marriages where one or both parties are underage.

(6) Make investigations, reports, and recommendations as provided in Section 281 of the Welfare and Institutions Code under the authority provided the probation officer in that code.

(7) Act as domestic relations cases investigator.

(8) Conduct mediation of child custody and visitation disputes.

(c) The superior court, or contracting superior courts, may also appoint, ~~with the consent of the board of supervisors,~~ associate counselors of conciliation and other office assistants as may be necessary to assist the family conciliation court in disposing of its

business. The associate counselors shall carry out their duties under the supervision of the supervising counselor of conciliation and have the powers of the supervising counselor of conciliation. Office assistants shall work under the supervision and direction of the supervising counselor of conciliation.

(d) The classification and salaries of persons appointed under this section shall be determined by:

(1) The ~~board of supervisors~~ superior court of the county in which a noncontracting family conciliation court operates.

(2) The ~~board of supervisors~~ superior court of the county which by contract has the responsibility to administer funds of the joint family conciliation court service.

Comment. Subdivision (a) of Section 1814 is amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code §§ 77001 (local trial court management), 77003 ("court operations" defined), 77200 (state funding of "court operations"); see also Cal. R. Ct. 10.810.

Subdivisions (c) and (d) are amended to reflect the enactment of the Trial Court Employment Protection and Governance Act, 2000 Cal. Stat. ch. 1010 (codified as Gov't Code §§ 71600-71675). See, e.g., Gov't Code §§ 71620(a) (job classifications and appointments), 71623(a) ("Each trial court may establish a salary range for each of its employee classifications.").

Fam. Code § 1834. Assistance to a Family Conciliation Court Petitioner

Section 1834 provides for assistance to a petitioner of the family conciliation court. The section states:

1834. (a) The clerk of the court shall provide, at the expense of the county, blank forms for petitions for filing pursuant to this part.

(b) The probation officers of the county and the attaches and employees of the family conciliation court shall assist a person in the preparation and presentation of a petition under this part if the person requests assistance.

(c) All public officers in each county shall refer to the family conciliation court all petitions and complaints made to them in respect to controversies within the jurisdiction of the family conciliation court.

(d) The jurisdiction of the family conciliation court in respect to controversies arising out of an instance of domestic violence is not exclusive but is coextensive with any other remedies either civil or criminal in nature that may be available.

It appears that only subdivision (a) needs revision to reflect trial court restructuring.

The subdivision requires blank petition forms be provided, at the county's expense. However, under the Trial Court Funding Act, the state pays for "court operations," set forth in Government Code Section 77003 and Court Rule 10.810. The cost of providing the blank petition forms appears to be a "court operation." See Cal. R. Ct. 10.810(d), Function 10 (listing "publications and legal notices, by the court"); *cf.* Cal. R. Ct. 10.810(d), Function 6 (listing court operations relating to dispute resolution programs, including conciliators, but signaling that "[a]ny other related services, supplies, and equipment" are under Function 10).

It therefore appears that Section 1834(a) should be revised to require blank petition forms be provided at the court's expense, rather than the county's expense.

Accordingly, for purposes of preparing a tentative recommendation, **the staff recommends revising Section 1834 as follows:**

1834. (a) The clerk of the court shall provide, at the expense of the ~~county~~ court, blank forms for petitions for filing pursuant to this part.

(b) The probation officers of the county and the ~~attaches~~ attachés and employees of the family conciliation court shall assist a person in the preparation and presentation of a petition under this part if the person requests assistance.

(c) All public officers in each county shall refer to the family conciliation court all petitions and complaints made to them in respect to controversies within the jurisdiction of the family conciliation court.

(d) The jurisdiction of the family conciliation court in respect to controversies arising out of an instance of domestic violence is not exclusive but is coextensive with any other remedies either civil or criminal in nature that may be available.

Comment. Subdivision (a) of Section 1834 is amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code §§ 77001 (local trial court management), 77003 ("court operations" defined), 77200 (state funding of "court operations"); Cal. R. Ct. 10.810(d), Function 10 ("court operations" include "publications and legal notices, by the court"); *cf.* Function 6 (listing "court operations" relating to dispute resolution programs, including conciliators, but signaling that "[a]ny other related services, supplies, and equipment" are allowable under Function 10").

Subdivision (b) is amended to make a stylistic revision.

Fam. Code § 1838. Family Conciliation Court Proceedings

Section 1838 governs family conciliation court proceedings. The section provides:

1838. (a) The hearing shall be conducted informally as a conference or a series of conferences to effect a reconciliation of the spouses or an amicable adjustment or settlement of the issues in controversy.

(b) To facilitate and promote the purposes of this part, the court may, with the consent of both parties to the proceeding, recommend or invoke the aid of medical or other specialists or scientific experts, or of the pastor or director of any religious denomination to which the parties may belong. Aid under this subdivision shall not be at the expense of the court or of the county unless the board of supervisors of the county specifically provides and authorizes the aid.

Subdivision (b) provides that a court, upon the parties' consent, may invoke the aid of a medical or other specialist, scientific expert, or director of a religious denomination to which the parties belong. If the board of supervisors specifically authorizes the aid, the county may allocate the cost of the aid to the court, or may elect to pay for such aid itself.

Due to the Trial Court Funding Act, it may no longer be appropriate to provide that the board of supervisors may authorize the aid to the court. Similarly, it may no longer be appropriate for the provision to authorize the county to allocate the cost of the aid to the court, or to pay for the aid itself. These issues are discussed below.

County Authorization of Aid to the Court

The first issue is whether the county should be able to authorize aid to the court by a medical or other specialist, scientific expert, or director of a religious denomination.

Due to the shift of responsibility for trial court operations from the county to the state, **the county should no longer authorize aid that may be invoked by the court.**

County Allocation of Cost to the Court

The next issue is whether the county should be authorized to allocate the cost of the aid to the court.

Under the Trial Court Funding Act, the county is no longer responsible for the trial court's budget. **Accordingly, the county should no longer be authorized to allocate the cost of the aid to the court.**

County Election To Pay the Cost

Another issue is whether the county should be able to elect to pay for the aid itself. It may no longer be appropriate for the county to elect to pay for the aid, since the county is no longer responsible for funding court operations.

However, it is not clear whether a "court operation" includes court-invoked aid by a medical or other specialist, scientific expert, or director of a religious denomination to which the parties belong.

Because the court may invoke the aid as part of the court's conciliation function, it seems that the aid could be a court operation.

But the provisions setting forth "court operations" do not clearly include such aid. Although an expert witness appointed for the court's own needs is a "court operation," the aid by an expert under Section 1838(b) does not appear to be aid by an expert witness. See Cal. R. Ct 10.810(d), Function 10. The expert does not provide testimony to help a court decide a case; instead, the aid by the expert is to help the parties conciliate.

Another provision lists "court-ordered forensic evaluations and *other professional services* (for the court's own use)" as a court operation. See Cal. R. Ct. 10.810(d), Function 10. Perhaps that encompasses aid invoked by a court under Section 1838(b). Cf. Cal. R. Ct. 10.810(d), Function 6 (listing court operations relating to dispute resolution programs, including conciliators, but signaling that "[a]ny other related *services, supplies, and equipment*" are under Function 10) (emphasis added).

The staff specially solicits comment on whether court-invoked aid under Section 1838(b) is a court operation. After we receive input on this point, we will be in a better position to suggest revisions to the provision.

Fam. Code § 1850. Judicial Council Duties

Section 1850 assigns several duties relating to family law to the Judicial Council. The section provides:

- 1850. The Judicial Council shall do all of the following:
 - (a) Assist counties in implementing mediation and conciliation proceedings under this code.

(b) Establish and implement a uniform statistical reporting system relating to proceedings brought for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, including, but not limited to, a custody disposition survey.

(c) Administer a program of grants to public and private agencies submitting proposals for research, study, and demonstration projects in the area of family law, including, but not limited to, all of the following:

(1) The development of conciliation and mediation and other newer dispute resolution techniques, particularly as they relate to child custody and to avoidance of litigation.

(2) The establishment of criteria to ensure that a child support order is adequate.

(3) The development of methods to ensure that a child support order is paid.

(4) The study of the feasibility and desirability of guidelines to assist judges in making custody decisions.

(d) Administer a program for the training of court personnel involved in family law proceedings, which shall be available to the court personnel and which shall be totally funded from funds specified in Section 1852. The training shall include, but not be limited to, the order of preference for custody of minor children and the meaning of the custody arrangements under Part 2 (commencing with Section 3020) of Division 8.

(e) Conduct research on the effectiveness of current family law for the purpose of shaping future public policy.

Subdivision (a) appears to need revision to reflect trial court restructuring. The subdivision requires the Judicial Council to “assist counties in implementing mediation and conciliation proceedings under this code.”

It appears that only the courts, not counties, implement mediation and conciliation proceedings under the Family Code. See, e.g., Fam. Code §§ 1800-1842 (Family Conciliation Court Law, implemented by courts), 3160 (providing that court must make mediator available), 20034 (Attorney-Mediator hired by court); see also Cal. R. Ct. 5.215 (setting forth protocol for Family Court Services for specified cases, including court-connected mediation).

Before trial court restructuring, the counties operated the trial courts. It thus made sense to refer to the county as the entity that implemented mediation and conciliation. Now that the court itself manages its operations, it is no longer appropriate to refer to the county as that entity. **Section 1850 should therefore be revised to reflect that courts implement mediation and conciliation proceedings under the Family Code.**

For purposes of preparing a tentative recommendation, **the staff recommends revising Section 1850 as follows:**

1850. The Judicial Council shall do all of the following:

(a) Assist ~~counties~~ courts in implementing mediation and conciliation proceedings under this code.

....

Comment. Subdivision (a) of Section 1850 is amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code §§ 77001 (local trial court management), 77003 ("court operations" defined), 77200 (state funding of "court operations"); see also Cal. R. Ct. 10.810.

DIVISION 8 OF THE FAMILY CODE. CUSTODY OF CHILDREN

Division 8 of the Family Code relates to child custody. Six provisions in Division 8 — Sections 3025.5, 3153, 3170, 3173, 3181, and 3188 — and one related provision in another division — Section 6303 — appear to need revision to reflect trial court restructuring.

The provisions are discussed below in numerical order, with the exception of Section 6303. That section is discussed after Section 3181, because those sections involve similar issues.

Fam. Code § 3025.5. Confidential Court Files

Section 3025.5 governs psychological evaluations of a child and recommendations relating to custody or visitation that are submitted to the court in a custody or visitation proceeding. The section requires that such evaluations and recommendations be kept confidential, but permits disclosure to specified persons.

The section states:

3025.5. In any proceeding involving child custody or visitation rights, if a report containing psychological evaluations of a child or recommendations regarding custody of, or visitation with, a child is submitted to the court, including, but not limited to, a report created pursuant to Chapter 6 (commencing with Section 3110) of this part, a recommendation made to the court pursuant to Section 3183, and a written statement of issues and contentions pursuant to subdivision (b) of Section 3151, that information shall be contained in a document that shall be placed in the confidential portion of the court file of the proceeding, and may not be disclosed, except to the following persons:

- (a) A party to the proceeding and his or her attorney.
- (b) A federal or state law enforcement officer, judicial officer, court employee, or family court facilitator for the county in which the action was filed, or an employee or agent of that facilitator, acting within the scope of his or her duties.
- (c) Counsel appointed for the child pursuant to Section 3150.
- (d) Any other person upon order of the court for good cause.

The section was enacted in 2004, without Commission involvement. See 2004 Cal. Stat. ch. 102, § 1.

The major trial court restructuring reforms were already in effect when this section was enacted. Nevertheless, clarifying one of the provisions to reflect those reforms may be helpful.

Subdivision (b) provides that the confidential files may be disclosed to a “family court facilitator *for the county*.” (Emphasis added). Although that could refer to the jurisdictional area (i.e., the county) in which a family court facilitator operates, it could be misinterpreted to refer to a family court facilitator employed by the county. Before trial court restructuring, it would have been appropriate to refer to a family court facilitator as an employee of the county, which was responsible for court employees. However, that is no longer the case.

The superior court is responsible for maintaining an office of family law facilitator and for appointing the family law facilitator. See Fam. Code § 10002. **Accordingly, it would be better to refer to the family court facilitator of the superior court.** That would be more precise and would avoid the potential for confusion.

For purposes of preparing a tentative recommendation, **the staff recommends revising Section 3025.5(b) as follows:**

3025.5. ...

(b) A federal or state law enforcement officer, judicial officer, court employee, or family court facilitator ~~for~~ of the superior court of the county in which the action was filed, or an employee or agent of that facilitator, acting within the scope of his or her duties.

....

Comment. Subdivision (b) of Section 3025.5 is amended to reflect the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov’t Code §§ 77000-77655).

Fam. Code § 3153. Compensation of Court-Appointed Counsel

In a custody or visitation proceeding, a court may appoint private counsel to represent the interests of a minor child, if the court determines it would be in the child's best interests. Fam. Code § 3150.

Section 3153 governs payment of the appointed counsel. The section provides:

3153. (a) If the court appoints counsel under this chapter to represent the child, counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Except as provided in subdivision (b), this amount shall be paid by the parties in the proportions the court deems just.

(b) Upon its own motion or that of a party, the court shall determine whether both parties together are financially unable to pay all or a portion of the cost of counsel appointed pursuant to this chapter, and the portion of the cost of that counsel which the court finds the parties are unable to pay shall be paid by the county. The Judicial Council shall adopt guidelines to assist in determining financial eligibility for county payment of counsel appointed by the court pursuant to this chapter.

The section was enacted in 1992 on Commission recommendation, and has not been amended since. See 1992 Cal. Stat. ch. 162; Fam. Code § 3153 Comment.

The provision states that the parties are to pay for the child's counsel, in proportions deemed just by the court. Subdivision (b) provides that the county is to pay any portion that the court determines the parties are unable to pay.

However, the Trial Court Funding Act expressly places responsibility for such payment with the court, not the county. See Gov't Code § 77003(a)(4) (court operations include "counsel appointed by the court to represent a minor pursuant to Chapter 10 (commencing with Section 3150) of Part 2 of Division 8 of the Family Code"); see also Cal. R. Ct. 10.810(d), Function 7 (costs reported in Function 7 include "[e]xpenses for court-appointed counsel as specified in Government Code § 77003").

Accordingly, Section 3153 should be revised to reflect that the court, not the county, is responsible to pay the portion that the parties cannot pay.

For purposes of preparing a tentative recommendation, **the staff recommends revising Section 3153 as follows:**

3153. ...

(b) Upon its own motion or that of a party, the court shall determine whether both parties together are financially unable to pay all or a portion of the cost of counsel appointed pursuant to this chapter, and the portion of the cost of that counsel which the court finds the parties are unable to pay shall be paid by the ~~county~~ court. The Judicial Council shall adopt guidelines to assist in determining financial eligibility for ~~county~~ court payment of counsel appointed by the court pursuant to this chapter.

Comment. Subdivision (b) of Section 3153 is amended to reflect the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code §§ 77003 ("court operations" defined), 77003(a)(4) ("court operations" include "counsel appointed by the court to represent a minor pursuant to Chapter 10 (commencing with Section 3150) of Part 2 of Division 8 of the Family Code"), 77200 (state funding of "court operations"); Cal. R. Ct. 10.810(d), Function 7 ("court operations" include "[e]xpenses for court-appointed counsel as specified in Government Code § 77003").

Fam. Code § 3170. Custody and Visitation Mediation and Domestic Violence Cases

Section 3170 relates to custody and visitation mediation and domestic violence cases.

The section provides:

3170. (a) If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation.

(b) Domestic violence cases shall be handled by Family Court Services in accordance with a separate written protocol approved by the Judicial Council. The Judicial Council shall adopt guidelines for services, other than services provided under this chapter, that counties may offer to parents who have been unable to resolve their disputes. These services may include, but are not limited to, parent education programs, booklets, video recordings, or referrals to additional community resources.

The section was enacted in 1993 on Commission recommendation. See 1993 Cal. Stat. ch. 219, § 116.87; Fam. Code § 3170 Comment. In 1996, subdivision (b) was added, without Commission involvement. See 1996 Cal. Stat. ch. 761, § 5. In 2009, the section was amended on Commission recommendation to replace "videotapes" with "video recordings." See 2009 Cal. Stat. ch. 88, § 37; Fam. Code § 3170 Comment.

It appears that subdivision (b) needs revision to reflect the shift of responsibility for court operations under the Trial Court Funding Act.

Subdivision (b) requires the Judicial Council to adopt guidelines for services that *counties* may offer, other than mediation services provided under the chapter, to parents who are unable to resolve their disputes. Cf. Fam. Code §§ 3160-3188 (chapter relating to mediation services for custody and visitation issues).

Two aspects of that provision appear to warrant its revision. First, the provision implies that counties provide the mediation services under the chapter. However, as already discussed in connection with Section 1850, it appears that courts, not counties, provide those mediation services.

Second, the provision also refers to other services — non-mediation services — as ones that counties may offer. However, it appears that the non-mediation services may be provided by counties, or courts. For example, “parent education programs, booklets, video recordings, or referrals to additional community resources” could be provided by a court as well as a county. Also, the court rule that sets forth the guidelines prescribed by Section 3170(b) indicates that the non-mediation services include court and county services. See Cal. R. Ct. 5.215. The rule provides that the services may include “programs for perpetrators, counseling and education for children, parent education, services for victims, and legal resources, such as family law facilitators.” Cal. R. Ct. 5.215(d)(7). Such services appear to include both court (e.g., family law facilitators) and county services (e.g., programs for perpetrators).

Based on the above, it appears that Section 3170 should be revised to (1) eliminate the implication that counties provide mediation services under the chapter, and (2) reflect that non-mediation services may be provided by either the county or the court.

For purposes of preparing a tentative recommendation, **the staff recommends revising Section 3170 along the following lines:**

3170. ...

(b) Domestic violence cases shall be handled by Family Court Services in accordance with a separate written protocol approved by the Judicial Council. The Judicial Council shall adopt guidelines for services, other than services provided under this chapter, that courts or counties may offer to parents who have been unable to resolve their disputes. These services may include, but are not

limited to, parent education programs, booklets, video recordings, or referrals to additional community resources.

Comment. Subdivision (b) of Section 3170 is amended to reflect the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655).

Fam. Code § 3173. Mediation of Dispute on Existing Custody or Visitation Order

Section 3173 governs mediation of a dispute about an existing order relating to custody or visitation. The section provides:

3173. (a) Upon the adoption of a resolution by the board of supervisors authorizing the procedure, a petition may be filed pursuant to this chapter for mediation of a dispute relating to an existing order for custody, visitation, or both.

(b) The mediation of a dispute concerning an existing order shall be set not later than 60 days after the filing of the petition.

The section was enacted on Commission recommendation in 1993, and has not been amended since. See 1993 Cal. Stat. ch. 219, § 116.87; Fam. Code § 3173 Comment.

Under subdivision (a), a petition for mediation of an existing order may only be filed if the board of supervisors has authorized it.

However, the county is no longer responsible for managing or funding court operations. Under the Trial Court Funding Act, each trial court is responsible for management of its operations. See Gov't Code § 77001.

Several management responsibilities lie with the presiding judge, who is to establish policies, and allocate resources

in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances services to the public.

See Cal. R. Ct. 10.603(a). These management responsibilities seem to encompass responsibility for determining whether to allow petitions to mediate disputes over existing custody or visitation orders.

Accordingly, for purposes of preparing a tentative recommendation, **the staff recommends revising Section 3173 along the following lines:**

3173. (a) Upon ~~the adoption of a resolution by the board of supervisors~~ an order of the presiding judge of a superior court

authorizing the procedure in that court, a petition may be filed pursuant to this chapter for mediation of a dispute relating to an existing order for custody, visitation, or both.

....

Comment. Subdivision (a) of Section 3173 is amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code §§ 77001 (local trial court management), 77003 ("court operations" defined), 77200 (state funding of "court operations"); see also Cal. R. Ct. 10.603(a) (responsibilities of presiding judge of superior court).

Fam. Code § 3181. Separate Meetings with Mediator

Section 3181 requires a mediator to meet separately with each party, upon request by a party alleging domestic violence, as specified.

The section provides:

3181. (a) In a proceeding in which mediation is required pursuant to this chapter, where there has been a history of domestic violence between the parties or where a protective order as defined in Section 6218 is in effect, at the request of the party alleging domestic violence in a written declaration under penalty of perjury or protected by the order, the mediator appointed pursuant to this chapter shall meet with the parties separately and at separate times.

(b) Any intake form that an agency charged with providing family court services requires the parties to complete before the commencement of mediation shall state that, if a party alleging domestic violence in a written declaration under penalty of perjury or a party protected by a protective order so requests, the mediator will meet with the parties separately and at separate times.

The section was enacted in 1993 on Commission recommendation, and has not been amended since. See 1993 Cal. Stat. ch. 219, § 116.87; Fam. Code § 3181 Comment.

(Note: Although Section 3181 does not refer to "county" or "board of supervisors" — the key terms used in our search of the codes — we examined it while studying Section 3170. In our examination, it became apparent that the section may need revision to reflect trial court restructuring.)

Section 3181(b) concerns an intake form that "an agency charged with providing family court services" may require parties to complete before mediation begins. It seems that "agency" refers to a non-court entity. The remainder of the discussion proceeds on that assumption.

Due to trial court restructuring, two issues arise: (1) whether it remains appropriate to refer to an “agency” as the entity charged with providing family court services, and (2) whether it is appropriate to refer to an “agency” as the entity that may require a party to complete an intake form before mediation begins. These two issues are discussed in turn below.

Agency Charged with Providing Services

Is it appropriate to refer to an agency as the entity charged with providing family court services?

Family Court Services, capitalized, provides “court-connected child custody services and child custody mediation made available by superior courts ...” Cal. R. Ct. 5.215(c)(5).

Perhaps family court services, not capitalized, refers generally to services relating to the family court. And it appears that agencies do perform such services, as indicated by discussion in unpublished cases. See, e.g., *In re Kailey M.*, 2008 WL 948295, *1 (referring to temporary restraining order prohibiting contact between father and daughter, except for “court-ordered visitation,” and referring to court-authorized visitation supervised by Riverside County Department of Social Services); *Zen v. Nguyen*, 2003 WL 1879618, *2, n. 3 (reciting recommendation by court screener for court to order father’s “supervised visitation ... at a mutually agreed upon supervising agency”), *In re Marriage of Chung*, 2002 WL 31480270, *1 (trial court order for parties to “work together to arrange visitation by a professional supervising agency” or “to schedule mediation with Family Court Services”).

A court rule further indicates that an agency may indeed be charged with providing family court services. The rule uses similar language to Section 3181:

Any intake form that an agency charged with providing family court services requires the parties to complete before the commencement of mediation or evaluation must state that, if a party alleging domestic violence in a written declaration under penalty of perjury or a party protected by a protective order so requests, the Family Court Services staff must meet with the parties separately and at separate times.

Cal. R. Ct. 5.215(e)(2). (Note: Another provision of the rule indicates that Family Court Services — the court-connected custody and mediation services — must also inform parties, before mediation begins, to have the mediator meet with the parties separately. See Cal. R. Ct. 5.215(d)(6).)

Based on the above, it appears to remain appropriate to refer to an agency as being charged with providing family court services.

Required Intake Form Before Mediation

The second issue pertains to whether it is appropriate to describe an agency charged with providing family court services as an entity that may require a party to complete an intake form before mediation begins.

Because the court provides the mediation, it seems that the court, not an agency, may require completion of the form. **If so, perhaps Section 3181 should be revised along the following lines:**

3181. ...

(b) Any intake form that ~~an agency charged with providing family court services requires~~ the court requires the parties to complete before the commencement of mediation shall state that, if a party alleging domestic violence in a written declaration under penalty of perjury or a party protected by a protective order so requests, the mediator will meet with the parties separately and at separate times.

Comment. Subdivision (b) of Section 3181 is amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code §§ 77001 (local trial court management), 77003 ("court operations" defined), 77200 (state funding of "court operations").

However, it seems possible that a court could authorize an agency to require completion of a form. If so, maybe no revisions are needed to Section 3181. **The staff specially seeks comment on those issues.**

Fam. Code § 6303. Support Person for Domestic Violence Victim

After examining Section 3181, the staff searched for provisions with similar language that may also need revision to reflect trial court restructuring, but that would not be found in a search for "county" or "board of supervisors." We found only one — Section 6303.

Section 6303 relates to a support person for somebody who alleges to be a victim of domestic violence. It provides:

6303. (a) It is the function of a support person to provide moral and emotional support for a person who alleges he or she is a victim of domestic violence. The person who alleges that he or she is a victim of domestic violence may select any individual to act as

a support person. No certification, training, or other special qualification is required for an individual to act as a support person. The support person shall assist the person in feeling more confident that he or she will not be injured or threatened by the other party during the proceedings where the person and the other party must be present in close proximity. The support person is not present as a legal adviser and shall not give legal advice.

(b) A support person shall be permitted to accompany either party to any proceeding to obtain a protective order, as defined in Section 6218. Where the party is not represented by an attorney, the support person may sit with the party at the table that is generally reserved for the party and the party's attorney.

(c) Notwithstanding any other provision of law to the contrary, if a court has issued a protective order, a support person shall be permitted to accompany a party protected by the order during any mediation orientation or mediation session, including separate mediation sessions, held pursuant to a proceeding described in Section 3021. *The agency charged with providing family court services shall advise the party protected by the order of the right to have a support person during mediation.* A mediator may exclude a support person from a mediation session if the support person participates in the mediation session, or acts as an advocate, or the presence of a particular support person is disruptive or disrupts the process of mediation. The presence of the support person does not waive the confidentiality of the mediation, and the support person is bound by the confidentiality of the mediation.

(d) In a proceeding subject to this section, a support person shall be permitted to accompany a party in court where there are allegations or threats of domestic violence and, where the party is not represented by an attorney, may sit with the party at the table that is generally reserved for the party and the party's attorney.

(e) Nothing in this section precludes a court from exercising its discretion to remove a person from the courtroom when it would be in the interest of justice to do so, or when the court believes the person is prompting, swaying, or influencing the party protected by the order.

(Emphasis added.) The section was enacted in 1993 on Commission recommendation, and amended in 1996 without Commission involvement. See 1996 Cal. Stat. ch. 761, § 7, 1993 Cal. Stat. ch. 219, § 154; Fam. Code § 6303 Comment.

Subdivision (c) requires an "agency charged with providing family court services" to advise a party with a protective order of the right to have a support person during mediation. It appears that an "agency" may provide family court services, as already discussed in connection with Section 3181. As such, it seems

appropriate to leave intact the requirement for such an agency to advise a party of the right to a support person.

Family Court Services — which are court-connected services provided by the court — must also advise a party of the right to a support person. See Fam. Code § 3170(b) (requiring domestic violence cases be handled by Family Court Services in accordance with written protocol by Judicial Council); Cal. R. Ct. 5.215(b) (setting forth written protocol by Judicial Council), Cal. R. Ct. 5.215(h)(1) (requiring Family Court Services to advise party of right to support person); see also Cal. R. Ct. 5.215(c)(5) (defining “Family Court Services”).

Before trial court restructuring, “agency” in Section 6303 may have been broad enough to refer to Family Court Services, since the county operated the court. Because the county no longer operates the court, it seems that “agency” does not encompass Family Court Services.

Accordingly, it appears that Section 6303 should be revised to reflect that Family Court Services, as well as an “agency charged with providing family court services,” must inform a party of the right for a support person.

For purposes of preparing a tentative recommendation, **the staff recommends revising Section 6303(c) along the following lines:**

6303. ...

(c) Notwithstanding any other provision of law to the contrary, if a court has issued a protective order, a support person shall be permitted to accompany a party protected by the order during any mediation orientation or mediation session, including separate mediation sessions, held pursuant to a proceeding described in Section 3021. The Family Court Services, and any agency charged with providing family court services, shall advise the party protected by the order of the right to have a support person during mediation. A mediator may exclude a support person from a mediation session if the support person participates in the mediation session, or acts as an advocate, or the presence of a particular support person is disruptive or disrupts the process of mediation. The presence of the support person does not waive the confidentiality of the mediation, and the support person is bound by the confidentiality of the mediation.

....

Comment. Subdivision (c) of Section 6303 is amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov’t Code §§ 77000-77655). See, e.g., Gov’t Code §§ 77001 (local trial court management), 77003 (“court operations” defined), 77200 (state funding of “court operations”); see also Fam. Code § 3170(b) (requiring domestic

violence cases to be handled by Family Court Services according to approved protocol by Judicial Council), Cal. R. Ct. 5.215(b) (“This rule sets forth protocol for Family Court Services’ handling of domestic violence cases consistent with requirement of Family Code section 3170(b).”), Cal. R. Ct. 5.215(h)(1) (“Family Court Services staff must advise the party protected by a protective order of the right to have a support person attend any mediation orientation or mediation sessions, including separate mediation sessions, under Family Code section 6303.”).

Fam. Code § 3188. Confidential Mediation Program

Section 3188 relates to a confidential mediation program that a court, if selected by the Judicial Council, may adopt. The section provides:

3188. (a) Any court selected by the Judicial Council under subdivision (c) may voluntarily adopt a confidential mediation program that provides for all of the following:

(1) The mediator may not make a recommendation as to custody or visitation to anyone other than the disputing parties, except as otherwise provided in this section.

(2) If total or partial agreement is reached in mediation, the mediator may report this fact to the court. If both parties consent in writing, where there is a partial agreement, the mediator may report to the court a description of the issues still in dispute, without specific reference to either party.

(3) In making the recommendation described in Section 3184, the mediator may not inform the court of the reasons why it would be in the best interest of the minor child to have counsel appointed.

(4) If the parties have not reached agreement as a result of the initial mediation, this section does not prohibit the court from requiring subsequent mediation that may result in a recommendation as to custody or visitation with the child if the subsequent mediation is conducted by a different mediator with no prior involvement with the case or knowledge of any communications, as defined in Section 1040 of the Evidence Code, with respect to the initial mediation. The court, however, shall inform the parties that the mediator will make a recommendation to the court regarding custody or visitation in the event that the parties cannot reach agreement on these issues.

(5) If an initial screening or intake process indicates that the case involves serious safety risks to the child, such as domestic violence, sexual abuse, or serious substance abuse, the court may provide an initial emergency assessment service that includes a recommendation to the court concerning temporary custody or visitation orders in order to expeditiously address those safety issues.

(b) This section shall become operative upon the appropriation of funds in the annual Budget Act sufficient to implement this section.

(c) This section shall apply only in four or more counties selected by the Judicial Council that currently allow a mediator to make custody recommendations to the court and have more than 1,000 family law case filings per year. The Judicial Council may also make this section applicable to additional counties that have fewer than 1,000 family law case filings per year.

The section was enacted in 2002, after the major trial court restructuring reforms. See 2002 Cal. Stat. ch. 1077, § 4. However, it appears that subdivision (c) may need revision to reflect those reforms. It also appears that paragraph (5) of subdivision (a) needs a technical revision, unrelated to trial court restructuring. Both of these provisions are discussed in turn below.

Revisions To Reflect Trial Court Restructuring

Subdivision (c) provides that the confidential mediation program described in Section 3188 applies only in counties selected by the Judicial Council. One criterion for selection is that the county currently allows a mediator to make custody recommendations to the court.

However, a court, not a county, decides whether a mediator may make such recommendations. See Fam. Code § 3183 (“Except as provided in Section 3188, the mediator may, consistent with local court rules, submit a recommendation to the court as to the custody of or visitation with the child.”); *In re Marriage of Rosson*, 178 Cal. App. 3d 1094, 1103-04, 224 Cal. Rptr. 250 (1986) (construing former Civil Code Section 4607, upon which Family Code Section 3183 is based, to permit mediator to make recommendations if provided by local court rule); see also Fam. Code § 3183 Comment.

Before trial court restructuring, a reference to the county could serve as a reference to the court. However, now that courts are no longer county entities, the reference to county in Section 3188(c) should be revised to refer to the court itself.

For purposes of preparing a tentative recommendation, **the staff recommends revising Section 3188(c) along the following lines:**

3188. ...

(c) This section shall apply only in four or more ~~counties~~ superior courts selected by the Judicial Council that currently allow a mediator to make custody recommendations to the court and

have more than 1,000 family law case filings per year. The Judicial Council may also make this section applicable to additional ~~counties~~ superior courts that have fewer than 1,000 family law case filings per year.

Comment. Subdivision (c) of Section 3188 is amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code § 77001 (local trial court management); see also Fam. Code § 3183(a) (authorizing mediator to make recommendations, except as provided in Section 3188, to court consistent with local rules).

Other Technical Revisions

Paragraph (5) of subdivision (a) states:

If an initial screening or intake process indicates that the case involves serious safety risks to the child, such as domestic violence, sexual abuse, or serious substance abuse, the *court* may provide an initial emergency assessment service that includes a recommendation to the *court* concerning temporary custody or visitation orders in order to expeditiously address those safety issues.

(Emphasis added.)

The provision purports to authorize the court to make a recommendation to the court. That seems odd. It seems likely that the provision was intended to provide that a *mediator* may make a recommendation to the court. That would be consistent with other provisions in Section 3188 that refer to a recommendation by a mediator. See, e.g., Section 3188(a)(1), (a)(3), (a)(4).

The issue is not related to trial court restructuring, but the Commission has authority to make minor technical corrections. See Gov't Code § 8298. If the Commission is already recommending revisions to Section 3188 to reflect trial court restructuring, it would make sense to also recommend a revision to correct a technical error.

Accordingly, for purposes of preparing a tentative recommendation, **the staff recommends revising Section 3188(a)(5) as follows:**

3188. (a) ...

(5) If an initial screening or intake process indicates that the case involves serious safety risks to the child, such as domestic violence, sexual abuse, or serious substance abuse, the ~~court~~ mediator may provide an initial emergency assessment service that includes a recommendation to the court concerning temporary custody or

visitation orders in order to expeditiously address those safety issues.

....

Comment. Paragraph (5) of subdivision (a) of Section 3188 is amended to make a technical correction. An erroneous reference to "the court" is replaced with a reference to "the mediator."

....

Respectfully submitted,

Catherine Bidart
Staff Counsel

EVIDENCE CODE SECTION 754

754. (a) As used in this section, “individual who is deaf or hearing impaired” means an individual with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone, but does not include an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment provided pursuant to Section 54.8 of the Civil Code.

(b) In any civil or criminal action, including, but not limited to, any action involving a traffic or other infraction, any small claims court proceeding, any juvenile court proceeding, any family court proceeding or service, or any proceeding to determine the mental competency of a person, in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or any administrative hearing, where a party or witness is an individual who is deaf or hearing impaired and the individual who is deaf or hearing impaired is present and participating, the proceedings shall be interpreted in a language that the individual who is deaf or hearing impaired understands by a qualified interpreter appointed by the court or other appointing authority, or as agreed upon.

(c) For purposes of this section, “appointing authority” means a court, department, board, commission, agency, licensing or legislative body, or other body for proceedings requiring a qualified interpreter.

(d) For the purposes of this section, “interpreter” includes, but is not limited to, an oral interpreter, a sign language interpreter, or a deaf-blind interpreter, depending upon the needs of the individual who is deaf or hearing impaired.

(e) For purposes of this section, “intermediary interpreter” means an individual who is deaf or hearing impaired, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary between the individual who is deaf or hearing impaired and the qualified interpreter.

(f) For purposes of this section, “qualified interpreter” means an interpreter who has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired.

(g) In the event that the appointed interpreter is not familiar with the use of particular signs by the individual who is deaf or hearing impaired or his or her particular variant of sign language,

the court or other appointing authority shall, in consultation with the individual who is deaf or hearing impaired or his or her representative, appoint an intermediary interpreter.

(h) Prior to July 1, 1992, the Judicial Council shall conduct a study to establish the guidelines pursuant to which it shall determine which testing organizations, agencies, or educational institutions will be approved to administer tests for certification of court interpreters for individuals who are deaf or hearing impaired. It is the intent of the Legislature that the study obtain the widest possible input from the public, including, but not limited to, educational institutions, the judiciary, linguists, members of the State Bar, court interpreters, members of professional interpreting organizations, and members of the deaf and hearing-impaired communities. After obtaining public comment and completing its study, the Judicial Council shall publish these guidelines. By January 1, 1997, the Judicial Council shall approve one or more entities to administer testing for court interpreters for individuals who are deaf or hearing impaired. Testing entities may include educational institutions, testing organizations, joint powers agencies, or public agencies.

Commencing July 1, 1997, court interpreters for individuals who are deaf or hearing impaired shall meet the qualifications specified in subdivision (f).

(i) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person's regular duties as an employee of the state, county, or other political subdivision of the state. Payment of the interpreter's fee shall be a charge against the county, or other political subdivision of the state, in which that action is pending. Payment of the interpreter's fee in administrative proceedings shall be a charge against the appointing board or authority.

(j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an interpreter shall be made, without any unnecessary delay unless either the individual who is deaf or hearing impaired affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder.

(k) No statement, written or oral, made by an individual who the court finds is deaf or hearing impaired in reply to a question of a peace officer, or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding, may be used against that individual

who is deaf or hearing impaired unless the question was accurately interpreted and the statement was made knowingly, voluntarily, and intelligently and was accurately interpreted, or the court makes special findings that either the individual could not have used an interpreter or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder and that the statement was made knowingly, voluntarily, and intelligently.

(l) In obtaining services of an interpreter for purposes of subdivision (j) or (k), priority shall be given to first obtaining a qualified interpreter.

(m) Nothing in subdivision (j) or (k) shall be deemed to supersede the requirement of subdivision (b) for use of a qualified interpreter for individuals who are deaf or hearing impaired participating as parties or witnesses in a trial or hearing.

(n) In any action or proceeding in which an individual who is deaf or hearing impaired is a participant, the appointing authority shall not commence proceedings until the appointed interpreter is in full view of and spatially situated to assure proper communication with the participating individual who is deaf or hearing impaired.

(o) Each superior court shall maintain a current roster of qualified interpreters certified pursuant to subdivision (f).